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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 876

In the Matter of the Petition
of
WILLS LINES, INC.,
for exemption from, or limitation of, liability,
Petitioner,

TANKPORT TERMINALS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Wills Lines, Inc., prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit in the above entitled matter.

The Opinions of the Courts Below

The opinion of the United States District Court for the Southern District of New York sitting in admiralty denying petitioner leave to surrender its vessel and her pending freights to a Trustee (R. 371-372, Noonan, D. J.) is

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CITATION ABBREVIATIONS

"R"—Original Record herein.
"A"—Separate Appendix hereto.
"Pet. Ap."—Petitioner's Appendix in the Court of Appeals on file in this Court.
"Pet. Supp. Ap."—Petitioner's Supplemental appendix in Court of Appeals filed herewith.
"Find."—Findings below.

unreported and is printed in the separate appendix hereto *infra*, pp. A-1.

The decision of the United States Court of Appeals for the Second Circuit (Chase, Clark and Frank, C. JJ.) (R. 387, 388) summarily affirming the order of the District Court, *supra*, is unreported and is printed in the separate appendix hereto *infra*, page A-2.

The opinion of the Court of Appeals for the Second Circuit, on respondent's intermediate appeal and petitioner's cross-appeal thereon (Clark, Medina and Lumbard, C. JJ., opinion by Medina, C. J.), is reported at 227 F. 2d 509; 1956 A. M. C. 298.

The opinion of the Court of Appeals for the Second Circuit affirming, except as modified, the Decree of the District Court upon the merits (Hand, Hincks and Lumbard, C. JJ., opinion by Hincks, C. J.) is not yet reported and is printed in the separate appendix hereto *infra*, pages A-3-9.

Jurisdiction

The decisions and judgments of the Court of Appeals for the Second Circuit sought to be reviewed were entered on October 8, 1953 and January 8, 1958, respectively.

Jurisdiction of this Court is found in 28 U. S. Code Secs. 1254(1); 2101(c); and 2106.

Questions Presented

1. Where, by reason of the sudden descent of dense fog affording zero visibility, a ferry-boat and her passengers becomes entrapped in confined navigable waters surrounded by natural and man-made obstacles adjacent thereto and anchorage is impossible because of the lack of a holding bottom, as well as an insufficient swinging area, which would endanger the safety

of a ferry and her passengers, and her Master, by various maneuvers, endeavors to extricate her from her peril, does the mere fact that the ferry happened to be under some power at, or immediately prior to, the time of collision with one of the man-made, unmarked, obstacles constitute negligence per se?

2. Where a pier operator, with the consent and approval of the Secretary of War, maintains a trestle structure and pier extending, in length, over a mile from the New Jersey shore and well beyond the pierhead line, into the navigable waters of Upper New York Bay and, without command or requirement of said War Department, it recognizes the necessity of warning navigators in the waters adjacent to its structure during darkness, in clear weather, of the precise location of that portion of its structure which extends into, and adjoins, the navigable waters, and does so by means of maintaining red, navigational, warning lights thereon, does it have a corresponding duty of marking the same with audible signals during fog and poor visibility or, at least, responding to the fog signals of a vessel fogbound near said structure?

3. In a cause of maritime collision where the shipowner seeks the protection of the Limitation of Liability Act by filing an ad interim stipulation for its interest in the vessel with its petition and the sole damage claimant disputes the value of the vessel (and, consequently, the sufficiency of the ad interim stipulation), is the filing of the ad interim stipulation with its petition such an irrevocable election of a method of procedure which precludes the shipowner from surrendering its vessel and her freights to a Trustee, rather than litigate the issue of value?

4. Simply because the District Court is sitting in Admiralty, may it properly deprive a defendant, to an alleged claim, of a trial before the Court in open

Court on basic, material, though complex, issues involved in the litigation (other than accounting and similar matters) by compelling it to litigate those issues before a Special Commissioner appointed on an ad hoc basis and at the defendant's expense?

5. In a compulsory evaluation proceeding respecting an old vessel with a limited market therefor, may a special commissioner, appointed for evaluation purposes, disregard comparable sales of somewhat similar vessels, cost plus improvements less depreciation, and the uncontradicted and unimpeached testimony of a disinterested businessman in the trade in which the vessel had previously been engaged, and base his finding of value upon the unfounded opinions of "experts"?

Statutes Involved

The Shipowners Limitation of Liability Act, the Admiralty Rules of the Supreme Court, and F. R. C. P. 53(b), which are pertinent to the questions presented are set forth in the separate appendix hereto *infra*, pages (A-10-12).

Statement of the Case

The motorvessel "MAYFAIR" was a ferry owned by the petitioner, used occasionally to relieve its regular ferry, in the transportation of passengers between the Battery, in lower Manhattan, and the Liberty shrine on Bedloes Island.

At the time of the event, she was 75 years old, of composite, wood and steel, construction (R. 249), 145 feet in length, 25 feet in beam with a draft of approximately 9 feet, twin-screw, diesel-propelled, and duly certificated and licensed by the U. S. Coast Guard for the carriage of

passengers in the waters involved (Find. 1, Pet. Sup. Ap. 24a). She had been purchased from the U. S. Government by the petitioner back in 1947 for the sum of $15,000.00 and, capital improvements in her, between acquisition and the event, amounted to $500.00, making petitioner's total investment in said vessel in the sum of $15,500.00 as of January 15, 1953, the date of the event.

Respondent, Tankport Terminals, Inc., sole claimant, below, was the lessee in possession and operator of a trestle type dock, owned by the U. S. Government, which extended from the New Jersey shore, to the southeast, for a distance of slightly over one mile into upper New York Bay at a position of approximately 350 yards southwest of Bedloes Island. Approximately 750 feet of this structure, measured from its offshore head towards the New Jersey shore, extends into the Northwest channel that connects docks in Jersey City with the main ship channel of Upper New York Bay and, as such, forms a southwesterly perimeter of the Northwest channel (Finds. 2, 3, Pet. Sup. Ap. 25a). Approximately 435 feet northwest of, and directly opposite the perimeter section of this structure, the Bedloes Island channel intersects the Northwest channel which intersection is marked by two spar buoys, "S-5" and "S-4A", neither of which are equipped with any aids to navigation or other signaling device when poor visibility sets in (Finds. 4, 6, Pet. Sup. Ap. 25a, 26a). At the extreme offshore end of respondent's structure, it maintained two, red, navigational lights and, 750 feet inshore therefrom on the perimeter section, it maintained another red, navigational, warning light, all of which could be seen in clear weather from a 360 degree circle, subject to any intervening visual obstructions. There were no navigational warnings, either aural or visual, between these two points upon the structure and, shortly after 08:00 P. M. on the night of January 15, 1953, these red lights were not visible. The structure was equipped with floodlights but, at the time of the collision, these were unlighted (Find.

8, Pet. Sup. Ap. 26a). Respondent had a watchman whose duty it was to make periodic inspections of the perimeter section of its structure, punch a clock thereon, and flash his light over its sides to ascertain whether any damage had been inflicted to it since his previous inspection (R. 596, Bugdon). So frequently was respondent's structure damaged by other vessels in the area, that it was profitable enough for a dock repair company to maintain a floating rig in that area for the repair of such damages (R. 580-584, Franklin).

On January 15, 1953, the "MAYFAIR" became enveloped by dense fog as she prepared to leave Bedloes Island for the Battery on her usual 03:30 P. M. trip. She remained at her dock until about 08:00 P. M. when the wind shifted and the fog lifted sufficiently to permit visibility for a one-quarter mile range and the silhouette of the respondent's darkened dock against the background of the shore lights to the southwest of it (Find. 15, Pet. Sup. Ap. 28a). The Captain of the "MAYFAIR" immediately cast off for the Battery carrying the 61 stranded passengers, predominantly women and children, and had just commenced to gain headway, at a speed of about three knots, down the rockbound, 300 foot wide, Bedloes Island channel, when the fog suddenly again shut in and visibility was reduced to zero. Appropriate lookouts were posted and the "MAYFAIR's" whistle was sounded at one minute intervals in conformance with proper procedure (Find. 17, Pet. Sup. Ap. 28a).

Some ten to fifteen minutes later, the "MAYFAIR" was in collision with the perimeter section of respondent's structure that extended into the Northwest Channel at a point forming the midline of the usable portion of the Bedloes Island channel and said structure. It was found, and conceded, that the red, navigational, warning lights on the structure were not visible through the fog, nor were its floodlights turned on, or any audible signals rendered by the respondent in response to the "MAY-

FAIR'," fog-signals. Collision with the respondent's structure occurred at about 08:15 P. M. (Find. 18, Pet. Sup. Ap. 29a) at which time respondent's watchman, Bugdon, was enclosed in its main office ashore, about a mile away from the point of collision, having lunch with his dog (R. 592, 593, Bugdon).

Upon colliding with respondent's structure, the "MAYFAIR's" Master placed her engines on slow ahead to hold her into respondent's dock pending an examination for puncture of the "MAYFAIR" and possible landing of his passengers thereon for safety. The ancient "MAYFAIR" sustained no damage and none of its passengers were injured (Find. 18, Pet. Sup. Ap. 29a) but this maneuver did further damage to respondent's structure. The Master immediately dispatched crewmen to the structure who, in turn, found the block valves of the oil lines thereon, 300 feet inshore from the point of collision, open causing the discharge of oil products into the Bay through some lines severed by the collision. They immediately shut down these valves, stopping the oil flow and resulting hazard, and then searched out respondent's watchman ashore and advised him of the occurrence.

On March 31, 1953, petitioner filed a petition for exoneration from, or limitation of, liability accompanied by two marine surveyors' affidavits of value and an ad interim stipulation for petitioner's interest in the "MAYFAIR" in the sum of $15,000.00, and her pending freight in the sum of $56.25, with the usual cost bond, and the usual restraining order was issued by the District Court.

Respondent, sole claimant below, filed its answer and claim for damages to its structure as well as an exception disputing the "MAYFAIR's" value and the District Court ordered a reference to a special commissioner appointed, *ad hoc*.

Petitioner objected to proceeding before the special commissioner and moved the District Court for leave to amend its petition and surrender the "MAYFAIR" to a

trustee to be appointed by the Court, rather than proceed before the commissioner (R. 351-355), which was denied (Opinion Order, R. 371-372; A-1).

Petitioner appealed to the Court of Appeals for the Second Circuit (R. 379) from the Order aforesaid, and the Court of Appeals, on motion by the respondent, summarily affirmed the District Court upon the authority of its *Ontario* case, 80 F. 2d 85 (R. 387, 388; A-2; otherwise, unreported).

Petitioner then moved the District Court to vacate its order of reference to the special commissioner and recall the matter of evaluation of the "MAYFAIR" to be heard by itself in open Court (R. 389-394), which was scathingly denied (R. 389-394; 404-417; Pet. Ap. 9a).

On March 31, 1954, the special commissioner filed his report finding a value for the "MAYFAIR" in the sum of $30,000.00 (R. 446-458; Pet. Ap. 12a). Exceptions thereto (R. 462-465) were overruled (R. 476-478) and the petitioner directed to pay the special commissioner a fee of $600.00.

Respondent then moved the District Court for an Order directing the petitioner to post additional funds or stipulation in the amount of $15,000.00, to meet with the special commissioner's finding of value and, in the event of default thereto, to grant it an interlocutory decree with a reference to another special commissioner for ascertainment of its damages. On September 16, 1954, the District Court (Bicks, D. J.) entered its order directing petitioner to post an additional $15,000.00 within fifteen days (R. 496, 499) but declined to rule upon the application for the interlocutory decree and reference in event of petitioner's default upon the ground that it was premature.

On October 27, 1954, respondent moved the District Court for an Order granting it an interlocutory decree with a reference to a special commissioner for ascertainment of its damages upon the ground of petitioner's failure to comply with the order directing it to post additional secu-

rity, as aforesaid. The District Court (Ryan, D. J.) denied the respondent's motion for an interlocutory decree and reference holding that the petitioner's default, upon this record, was not such a wilful default as to entitle the respondent to an interlocutory decree, but that petitioner would not be deprived of its right to dispute liability and damage (R. 500-510) though, since it was in default, its prayer for limitation of liability must be denied.

Respondent moved for rehearing, which was denied (R. 516-520) and then appealed to the Court of Appeals for the Second Circuit (R. 525).

On respondent's appeal aforesaid, petitioner cross-appealed to protect its objections and exceptions below (R. 526) respecting the compulsory reference to a special commissioner for appraisal of value of the "MAYFAIR", the order directing petitioner to pay the fee of the special commissioner on the compulsory reference, and its exceptions to the commissioner's report.

The Court of Appeals dismissed the respondent's appeal and petitioner's cross-appeal, as premature, 227 F. 2d 509.

Respondent moved the Court of Appeals for rehearing, and then mandamus, each of which was denied. It then petitioned this Court for certiorari, and in the alternative, mandamus, which was denied.

The cause finally came to trial upon the merits before Palmieri, D. J., who flatly refused to permit any testimony or evidence concerning the actual damage sustained by respondent's structure (R. 591), confining the trial solely to the issue of liability, and holding, over the objections of petitioner, that the issues respecting damages were for a special commissioner.

The District Court held the petitioner solely liable for such damage as respondent's structure may have sustained upon the ground that, at the moment of impact or immedi-

ately before, the vessel was under power. The Court of Appeals (A-7) affirmed the District Court holding that the fact that the "MAYFAIR" was under some power at the time of impact she

"was at fault on that account"

and that a conclusion of negligence therefor, "was right", citing its *Pennsylvania R. Co.* v. *Central R.R. of New Jersey*, 103 F. 2d 428, cert. den'd 308 U. S. 591, case, (A-7).

In affirming the District Court's holding of the Petitioner solely liable for the collision, the Court of Appeals further held that the respondent was under no duty to respond to the "MAYFAIR'S" fog signals, either audibly or visually, "because it knew of no rule of law imposing such a duty" (A-8).

The Court of Appeals, in affirming the District Court's denial to the Petitioner of the right to limit its liability, held that it did so because the Petitioner had failed to abide by an admiralty method of procedure which it had chosen—the *ad interim* stipulation for value method. This method the District Court held to be an irrevocable election, once taken, (A-1) that precluded the Petitioner from surrendering its vessel to a Trustee and thereby obliging it to submit to a compulsory evaluation proceeding before a Special Commissioner appointed for that purpose. The Court of Appeals had summarily affirmed this doctrine of "irrevocable election" (A-2) on the basis of its *Ontario* decision (1936), 80 F. 2d 85.

Likewise, the Court of Appeals affirmed the District Court's refusal to hear evidence upon the issue of damages and the reference of that issue to a Special Commissioner upon the ground that, though that issue does not appear to be "overly complex," the reference is, nevertheless, proper because the Supreme Court Admiralty Rules contain no counterpart of F. R. C. P. 53(b) (A-8).

In affirming the $30,000.00 valuation, as found by the Special Commissioner upon the compulsory evaluation ref-

erence, the Court of Appeals approved of the yardstick used by the Commissioner and the legal sufficiency of the evidence in support of that yardstick (A-6).

(The separately bound exhibits, submitted with the original record herewith, graphically and pictorially, depict the locale of the event.)

Reasons for Allowance of the Writ

The decision of the Court of Appeals for the Second Circuit is a novel one involving substantial questions concerning the interpretation and administration of the Shipowners' Limited Liability Act in conjunction with the procedural Admiralty Rules of this Court respecting the same; the jurisdiction and judicial powers of a District Court, sitting in Admiralty, in the administration of justice; an unprecedented rule of navigation and liability; and, a novel yardstick of evaluation under the Limitation of Liability Act, all of which are of the utmost concern and importance to shipowners, operators, underwriters and skilled navigators throughout the world using our ports and harbors in the course of foreign and domestic commerce.

Further, the decision of the Second Circuit, appears to be in direct conflict with decisions of this Court, as well as other Circuits, as is hereafter shown and is one which, by the language of the authority relied upon in reaching the decision—its *Pennsylvania* case, *supra*—begs for review and settlement by this honorable Court.

Questions 1 and 2—Collision Liability

Upon the issue of collision liability, the decision of the Court of Appeals for the Second Circuit conflicts with the decisions of this Court in *Atlee* v. *N. W. Union Packet*, 21 Wall. 389; *Casement* v. *Brown*, 148 U. S. 615; *The Morning Light*, 2 Wall. 550; decisions of the Seventh Circuit, precisely in point under similar circumstances and facts, namely: *Erie & Western Transportation Co.* v. *City of*

Chicago, 178 Fed. 42, cert. den'd 216 U. S. 620 and *City of Chicago* v. *Goodrich Transit Co.*, 199 Fed. 112, which cite and rely upon this Court's decision in *Casement* v. *Brown, supra;* and, decisions in the Sixth and Third Circuits.

The Second Circuit decision holds that, regardless of the nature of the waters and environment in which the vessel chances to be at the time, when she suddenly becomes enveloped by fog affording zero visibility, any movement of that vessel thereafter is negligence, *per se,* if a collision with an unmarked object, resulting in damage to that object, follows. As authority for this novel doctrine, the Second Circuit cites its opinion in its *Pennsylvania* case (*Pennsylvania R. Co.* v. *Central R. R. of New Jersey,* 103 F. 2d 428; 1939 A. M. C. 583; cert. den'd 308 U. S. 591), a situation having no similarity whatsoever with the situation in the case at Bar.

In the case at Bar, the 147 foot "MAYFAIR" had left her dock at Bedloes Island, with a quarter mile range of visibility, and the silhouette of the respondent's darkened dock, 1,000 feet ahead of her, was visible against the background of the New Jersey shore lights. She had proceeded a few hundred feet down the 300 foot wide Bedloes Island channel toward respondent's unmarked structure and was just gaining momentum at a speed of about 3 knots when fog, affording zero visibility, suddenly enveloped her. With rocks to both sides of her, the dock she had just left somewheres behind her, and respondent's unmarked structure some several hundred feet ahead of her, the rocky bottom affording no anchorage ground and the narrow width of the channel affording no scope within which to swing if the bottom had afforded a holding ground, any maneuver, or failure to maneuver, was fraught with danger to herself and passengers.

On the other hand, in the *Pennsylvania* case, the ferry "RED BANK" had left its slip in New Jersey in fog, affording a 35-foot range of visibility, and was seeking its slip in Manhattan while, admittedly, proceeding at a speed that

would not permit her to stop the way of the vessel within that 35-foot range. In the course of seeking her Manhattan slip, she struck a barge moored at the pierhead in the vicinity, and within the pierhead line, with such force as to sink her right there. The barge had lights upon it and the bargee heard the ferry's fog signals, but did not respond with any audible means. The Trial Court, quite logically, held both to blame—the ferry for proceeding at an excessive rate of speed and the barge for failing to sound an audible signal in response to the ferry's, 25 F. Supp. 846, 1938 A. M. C. 1044.

On appeal, the Second Circuit, modified the decree below to sole fault on the part of the ferry holding that, even though moored to a pierhead. a single vessel has no duty to disclose her location by audible means to a vessel nearby that is sounding fog signals, saying of this self-adopted doctrine:

> "We are confident that we ought not to intervene, and *until some competent authority does so, we shall leave the rule as it stands.* After all, it is not a bad pie-powder compromise; so far as it goes, there is something to be said for it; *nobody competent to pass upon it has said that it should extend further.* We hold, therefore, that a single vessel moored to a pierhead need not sound warnings." 1939 A. M. C. 583, 585. (Emphasis supplied.)

In the case at Bar, we are not dealing with a structure within the pierhead line or a vessel moored to the head of such a structure, but are dealing with a structure extending well beyond the New Jersey pierhead line for over a mile in length into the navigable waters of Upper New York Bay and the Northwest channel thereof in such fashion as to form a perimeter barrier in the southerly side of the Northwest channel. See, i.e., *Atlee* v. *N. W. Union Packet*, 21 Wall. 389.

In the *Pennsylvania* case, the ferry had the whole reach of the deep Hudson River behind her and the only possible obstacles were ahead of her. She admittedly was proceeding at a speed in excess of that required to stop within the 35-foot range of visibility. In the case at Bar, the "MAYFAIR" had been maneuvering in the confined waters, entrapped as she was, for some ten to 15 minutes dispelling any notion whatsoever of speed. Immediately before, or at the time of impact with the respondent's dock, her engines were found to be on slow ahead. Because she was under some power, at the time of impact, under the circumstances surrounding her the Court of Appeals holds that a conclusion of negligence, *per se*, is proper.

In the *Solomon's Island Ferry* case, 1937 A. M. C. 675, 679, the Court of Appeals for the State of Maryland, following the prevailing decisional rulings on this point, aptly states the law, viz.:

> "Considering the frequency with which fogs occur in certain areas, and the serious interruption of water transportation which would result, if persons charged with the operations of a ferry were required to suspend operations whenever a fog occurred, *the mere act of continuing to operate the ferry under fog conditions should not be characterized as negligence per se*, if it were operated prudently, cautiously and carefully, with due regard to the safety of the passengers, and so as *to avoid as far as possible injury or damage to* the person or *the property of others.*" (Emphasis supplied.)

And, in *Hoffman, et al.* v. *Union Ferry Co.*, 68 N. Y. 385, the New York State Court of Appeals, in considering the duty of a ferry pilot of proceeding or laying to in a fog, said:

> "The running of a ferryboat upon her regular trips is important to the public, and her efforts to serve

the public should be regarded with favor. Negligence would *not readily, or except upon a clear showing,* be imputed to her in endeavoring to make her trips in the dark or through fog, * * *." (Emphasis supplied.)

See also: *The Orange,* 46 Fed. 408.

In this respect, the decision of the Second Circuit imposes upon skilled navigators, contrary to natural intuition and seamanship, a horrifying rule of navigation when, by Acts of God, their vessels suddenly become imperiled in dangerous waters. Under the Second Circuit's decision, the Master must stop his vessel and let her lay to, trusting to fate and disregarding the effects of winds and currents upon her precarious position and safety. Any maneuver of her engines in an effort to extricate her from the dangers surrounding her is, *per se,* negligence. Research fails to reveal any such rule and, to layman or seaman, such a rule is contrary to common sense and the natural instinct to extricate from peril.

But the Second Circuit's decision goes radically further and exonerates the respondent from any liability whatsoever, holding the petitioner solely liable upon the purported analogy of its *Pennsylvania* case. It holds that *even* though the respondent recognized the necessity of marking its man-made structure with red—the traditional color of danger—navigational warning lights to aid navigators to avoid its structure during darkness in *clear* weather, it had no duty of returning audible, or other, signals to the "MAYFAIR's" in the dense fog, even though it had a watchman assigned to patrol the structure, and to make periodic examinations of the same for collision damages by craft using the channel.

This ruling appears to conflict with the holding of this Court in the leading case, *Casement* v. *Brown, supra,* which holds that it is the duty of proprietors of such structures

"*to give all needful warning* to persons and boats." 148 U. S. 615, 625. (Emphasis supplied.)

The Seventh Circuit, following *Casement* v. *Brown* as authority, in *Erie* v. *Western Transp. Co.* v. *City of Chicago, supra,* a case remarkably similar, stated:

> "The crib was a structure so placed for the purposes of the City, and with its creation the obligation was assumed to provide such means of warning as were well known requirements for the protection of navigators when darkness, fog, or thick weather, prevented reasonable observation of the structure from an approaching vessel; and this with or without specific directions in the permit or elsewhere. While a light was *needful* (and so recognized by the City) to mark the location at night, it is established, both by testimony in this record and by precedents, that lights are ineffectual for fog signals, and *that bells or other sounding means are imperative* and customary requirements for fog and thick weather signals.
>
> We are satisfied, therefor, that placing and maintaining the crib as located involves an obligation to provide thereon and give suitable fog signals *when needful for safe navigation;* that the collision in controversy arose through non-performance of that duty; and that the party responsible for the failure is answerable for the resulting damages.' (Emphasis supplied.)

And, following its *Erie & Western Transp.* decision, the Seventh Circuit, again following the holding in *Casement* v. *Brown*, stated in *City of Chicago* v. *Goodrich Transit Co., supra:*

> "The City having placed at the mouth of the harbor an obstruction to navigation, the legal obligation rested upon it to provide on the crib and to keep in use suitable fog signals. This record clearly shows that a light alone is not an efficient fog signal for safe navigation. *An audible signal was necessary under the law.*" (Emphasis supplied.)

Indeed, as this record clearly shows, had the Master of the "MAYFAIR" any warning whatsoever from the respondent's structure, even at a twenty-five foot distance from it, he could have avoided collision with it. And, as the undisputed testimony shows, had the respondent's watchman as much as turned on the structure's floodlights, in response to the "MAYFAIR'S" fog signals, the loom of those lights would have apprised the Master of the proximity of the vessel to the structure, so that he could have taken appropriate avoiding action. But, the Court of Appeals ignores that fact because, in its language, "it knows of no rule of law" placing the respondent under such a duty.

In the *Erie & Western Transp.* case, *supra,* like the respondent in the case at Bar, the City contended that unless specifically directed to do so by its permit, statute, or regulation *it* had no duty to mark its structure. Replying to that contention, the Seventh Circuit, quite logically, stated:

> "Whatever may be the force of statute or permit by way of authority to maintain the crib, this contention is without sanction, as we believe, in any reasonable view, either of the provisions referred to, or of the well recognized paramount rights of commerce to use navigable waterways and *have all needful warnings to guard against obstructions* placed therein." (Emphasis supplied.)

As members of this Court have often stated, the denial of a petition for certiorari does not necessarily mean that this Court approves of the decision sought to be reviewed. An examination of the petition, seeking certiorari in the Second Circuit's *Pennsylvania* case, which was denied, reveals that the petitioner, there, failed to show the mportance of the question, conflicts in decisions, or any of the reasons generally considered by this Court for the grant of the writ.

Question No. 3—Limitation of Shipowner's Liability—Substance v. *Procedure*

The Court of Appeals for the Second Circuit holds that where a shipowner initiates a proceeding for limitation of its liabilty under the Act 46 U. S. C. A. 183 (a), 185 and Gen. Adm. Rules 51 and 52 by filng an ad interim stipulation for value, with its petition for limitation, it thereby makes an irrevocable election of a method of proceeding thereafter.

The decision of the Second Circuit, places procedure above substance. Its decision is in direct conflict with that of *Ohio Transp. Co. et al.* v. *Davidson S. S. Co.*, 148 Fed. 185, cert. den'd, 203 U. S. 593, also a Seventh Circuit decision, and this Court's admonition contained in the *Scotland*, 105 U. S. 24, respecting the administration of General Admiralty Rules 51-54. The District Court and the Second Circuit both relied upon the doctrine enunciated by the Second Circuit in the *Ontario* No. 1, 80 F. 2d 85. In the *Ontario*, in contrast to the case at Bar, the petitioner deliberately underwent a valuation proceeding and then sought to surrender its vessel, in lieu of posting a bond, so that it, through a dummy, might buy its vessel back for a nominal figure at a Marshal's sale. In the case at Bar, when the respondent moved the issue of valuation on for hearing to ascertain, the petitioner moved for leave to amend its petition so as to surrender its vessel to a Trustee to be appointed by the Court because the best evidence of value of the "MAYFAIR" was the vessel itself, which was free and clear, rather than the speculations indulged in as so many of the cases on evaluation reveal. In the Second Circuit's *Ontario* case, relied on in the District Court and the Second Circuit, no authorities are cited and, for aught that appears, when it rendered the *Ontario* decision, it may very well have been unaware of the Seventh Circuit's *Ohio Transp.* decision, *supra*. In the *Ohio Transp.* case, the petitioner underwent an evaluation proceeding and, upon its conclusion, was dissatisfied with the valae found and peti-

tioned for leave to surrender its vessel, by amending its petition for limitation, rather than pay into Court the value found. The petition was granted and petitioner was permitted to surrender its vessel instead.

In the case at Bar, the petition for leave to amend and to surrender was promptly made and denied, whereby petitioner was compelled to undergo a valuation proceeding at great expense to it and over its protests.

As will be illustrated, the decision holding petitioner to an "irrevocable election" of a *manner* of proceeding in a limitation of liability proceeding, is inconsistent wth the due administration of justice. Thus, a vessel could be proceeding down New York harbor bound for a foreign port and be in collision with another vessel. Because her own physical damage is such as to permit her to safely continue with her voyage, she does so and, while upon the high seas, the other vessel asserts a claim for damages far in excess of the value of the first vessel. The first vessel's owner, seeking the protection of the Limitation of Liability Act, has no recourse other than to proceed by the ad interim stipulation for value method, which it does. Thereafter, the second vessel elects to challenge to value asserted by the petitioner for the first vessel and, rather than undergo the expensive, speculative, results of an evaluation proceeding, the petitioner seeks leave to surrender its vessel upon her return to New York, accounting for depreciation, etc., in a condition equivalent to that at the time of collision. Under the Second Circuit's decision, this is not possible and the first shipowner is bound to undergo a compulsory evaluation proceeding and its speculative result. As in the case at Bar, if the value found be in excess of what can be raised upon the vessel, the shipowner, in order to comply with the Court's order for payment into Court of the value found, would be obliged to dispose of other assets, in addition to the vessel, in order to comply. In the case at Bar, compliance with the order, based upon the value of $30,000.00 found upon the compulsory reference, meant that

the petitioner was obilged to dispose of other assets, to the harm of other creditors, or liquidate its business. Such, however, is not the spirit of the Act as declared by Congress. The Act was enacted to encourage investment in, and development of, an American merchant marine. The question, therefore, is of tremendous import to all connected with the shipping industry whether they be owners, operators, charterers or underwriters. Contrary to this Court's language in the *Scotland, supra,* the decision places procedure above substance, which is fundamentally clearly erroneous.

Question No. 4—Compulsory References in Admiralty

The Second Circuit holds that because the Supreme Court admiralty rules contain no counterpart of F. R. C. P. Rule 53(b) it is perfectly proper for a District Court, sitting in admiralty, to refer issues, other than accounting matters, to Special Commissioners, thereby ruling that this Court's decision in *La Buy* v. *Howes Leather Co.*, 1 L. Ed. 2d 290 (1957); *Los Angeles Brush Mfg. Co.* v. *James*, 272 U. S. 701; *McCullough* v. *Cosgrove*, 309 U. S. 634, are inapposite.

Indeed, in the District Court when petitioner sought an order staying the Special Commissioner from proceeding pending decision upon petitioner's application for leave to amend its petition and surrender its vessel, the stay was denied, the Judge (Dimick, D. J.) therein holding as the ground for the denial,

> "that it was not g od judicial administration to interfere with the commissioner."

A motion in the District Court to recall the reference to evaluate and to have the compulsory evaluation heard and determined in open Court was scathingly denied by the Judge (Clancy, D. J.) who had appointed the Special Commissioner, with ominous threats of "contempt" because petitioner had sought relief therefrom.

In short, and as stated not only by this Court in the *La Buy* case but by Chief Judge Clark, of the Second Circuit, in a dissenting opinion in the *Dona Aurora*, 206 F. 2d. 651, 656, 657, compulsory references are an abuse of a Court's powers and amount

> "to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."

In the case at bar, petitioner has been put to an inordinate expense upon the compulsory evaluation reference for an unwarranted extended record, not made by an official court reporter at rates set by the Court, but by a private stenographer appointed by the Special Commissioner at rates in excess of those of the Southern District court reporters. Petitioner has also been directed to pay the Special Commissioner a fee of $600.00 on this compulsory reference. Petitioner, like the many other millions of our citizens, is a taxpayer and is entitled to have its day in open court upon basic issues involved in the litigation, other than plain accounting items. Compulsory references, in other than simple accounting, constitute a delegation of the judicial function, without sanction of the Congress or the Supreme Court, to a temporary substitute appointed on an *ad hoc* basis, inexperienced not only in the judicial work, but in maritime matters as well. From the tax fund, the Congress allocates funds for the operation of the Federal judiciary system and petitioner is entitled, of right, to the judicial function in open Court and not, by compulsion and at its expense, before an unknown and questionable substitute. Further, the compulsory references herein are, as this record shows, plainly arbitrary. To sanction and approve compulsory references by District Judges, simply because they are sitting as admiralty judges instead of common-law judges without a jury, is to impose a different quality of justice administered by an admiralty court, to that of the common-law courts; something that is contrary to the oft-waved banner of

"equality under the law" and "equal application of the law." Nor, under General Admiralty Rule 43, does either, the District Court or the Circuit Court, attempt to show that the compulsory references, as to value and damages, are "expedient or necessary for the purposes of justice." See, *U. S. A.* v. *Kirkpatrick*, 186 F. 2d 393 (3rd C. of A.). Likewise, the compulsory reference of the issue of damages in the case at bar is not a mere tabulation such as would result had a joint survey prior to litigation been had. There are issues respecting damages concerning fraudulent padding of the same, attempts by the respondent to charge the petitioner, under the guise of damages, with capital improvements upon its structure made by respondent following the collision. These are not questions for an *ad hoc* appointee, but are questions requiring the judicial function of an experienced judge in open Court.

It is submitted, therefor, that references, whether at law or in admiralty, should be the exception and not the rule, F. R. C. P. 53(b), and should be made only where expedient or necessary for the purpose of justice, General Admiralty Rule 43, because references are productive of unnecessary expense and a burden to litigants by reason of extended records and hearings, *Los Angeles Brush Co., supra*, and are frowned upon by the Courts as not matters of right belonging to any litigant, *Bushey* v. *Hedges* (C. of A., 2d), 167 F. 2d 9, 17; and, in admiralty, as well as at common law, a litigant is entitled to the trial of all of the issues, except simple accounting matters, in open court, General Admiralty Rule 46, for the purposes of justice, *U. S. A.* v. *Kirkpatrick, supra; Adventures in Good Eating* v. *Best Places to Eat*, 131 F. 2d 809, and the delegation of a court's judicial function and refusal to hear the issues in open court is a denial of the judicial process, *La Buy* v. *Howes Leather Co., supra; The Dona Aurora, supra* (Judge Clark's dissenting opinion in the Second Circuit). The delegation of the judicial function to a special commissioner upon the compulsory eval-

uation, and the refusal to recall that reference, as well as the compulsory reference now pending for the ascertainment of the respondent's damages, all of which have been affirmed by the Second Circuit on the theory that the Admiralty rules contain no counterpart of F. R. C. P. 53(b), were an abuse of the district court's powers and constitute a denial of the judicial process to the petitioner. Under the American system of justice, there cannot be one quality of justice simply because a Judge chances to be sitting in admiralty, and another because he chances to be sitting at common law. Nor has the Congress ever authorized the District Judges, at the expense of a litigant, to delegate their appointed functions as Judges to individuals appointed by themselves for that purpose.

Question No. 5—The Yardstick of Evaluation of the "MAYFAIR"

In affirming the yardstick used by the special commissioner to reach his evaluation result, the Second Circuit has applied a yardstick of sheer doubt and speculation. The special commissioner found a value for the "MAYFAIR" at $30,000.00 based upon the opinions of "experts", and disregarded the evidence with respect to: (1) acquisition cost, plus improvements, less depreciation, (2) comparable sales of other vessels and (3) the fact, that while the hearings were being held before him, petitioner had lost the franchise for operation and the vessel was actually laid up and still was so when the case was before the Court of Appeals, and continues to be so to this day.

In 1947, six years prior to the collision, petitioner had acquired the "MAYFAIR" from the U. S. Maritime Commission for the sum of $15,000.00 and had made capital improvements in her in the sum of $500.00. The special commissioner held that her cost, plus improvements, less depreciation, could not be considered because it was "inconclusive."

Despite the fact that several other vessels of similar type, and some more modern in structure, were sold about

the time that the hearings were being held, the commissioner held that consideration of these other sales in order to reach an evaluation of the "MAYFAIR" could not be used because it was "impractical".

Consequently, the special commissioner relied upon the testimony of "experts" which he found to be "impressive". The Court of Appeals, affirmed this phase of the appeal contending that there was conflicting evidence before the special commissioner and therefore there was nothing to warrant reversal of his finding.

The only conflicting evidence before the special commissioner is the incompetent hearsay of the respondent's "experts" in contrast to actual proved facts uncontradicted, otherwise, upon this record. The testimony of respondent's "experts", which the special commissioner found to be "impressive", reveals that one was "a graduate of the School of Hard Knocks and the University of Bay Rum" (R. 244), and the other, who like the first, knew nothing about the condition of the "MAYFAIR's" bottom or engines (R. 216), knew of no comparable sales or potential purchasers or users for the "MAYFAIR" (R. 220), made no investigation to determine demand for a craft such as the "MAYFAIR" (R. 217), and whose testimony, as admitted by him, was based upon pure hearsay—what respondent's counsel had told him.

On the other hand, petitioner's expert, who had appraised the "MAYFAIR" for the valuation placed by petitioner in its ad interim stipulation of $15,000,00, based his value upon her acquisition cost plus improvements and less depreciation, quite properly stating with respect to value,

> "You just can't pick something out of the air" (R. 283).

The comparable sales of about six other vessels, which the special commissioner chose to ignore as "impractical" if properly considered and prorated to the "MAYFAIR's"

age, show an average market value of $9,500.00—a figure which also coincides with the "MAYFAIR'S" cost, plus improvements, less depreciation.

The successor to the petitioner in the franchise operation who outbid it for the franchise, though purchasing another vessel previously used on that operation, testified that because of the "MAYFAIR'S" age—75 years—it would only be willing to pay from $6,000.00-$8,000.00 to petitioner for her—vital, unimpeached, and uncontradicted, testimony by the one, if any, who could have made use of her, but ignored by the special commissioner in favor of the unfounded "expert" opinions.

This yardstick, it is submitted, conflicts with this Court's decision in *U. S.* v. *Toronto, Hamilton & Buffalo Nav. Co.*, 338 U. S. 396. See, also: *Cors* v. *U. S.*, 75 F. Supp. 235, remanded for further proceedings, 337 U. S. 325 and, upon remand, 96 F. Supp. 460.

As this Court has said in the *Toronto, Hamilton & Buffalo Nav. Co.*, case, *supra:*

> "We have said that the absence of 'market price' does not, ipso facto, rid isolated contemporaneous sales of all relevance."

In the case at Bar, there is no question that the market for vessels of the "MAYFAIR" type necessarily was, and is, a very limited one but, because of this unique situation, it is no reason to disregard comparable prices on such a limited market. And, as this Court has said,

> "the question is what the ordinary businessman in the trade would do."

Here, the ordinary businessman in the trade—the successful outbidder to the petitioner—affirmatively asserted what it would do by offering not in excess of $8,000.00 for the "MAYFAIR". No other possibilities, with the slightest foundation whatsoever, could be established by the re-

spondent. And, as stated by Chief Judge Clark in his dissenting opinion in the *Dona Aurora*, citing this Court's opinion in the *Toronto, Hamilton & Buffalo Nav. Co.*, case, *supra*, in support thereof:

> "As these figures themselves demonstrate, the process was that these high values of the experts were accepted as basic"

and then, as in the case at Bar, the unfounded expert opinion value was subjected to alleged comparisons with the factors ignored by the special commissioner in his effort to have the result seem more palatable.

And so, when an ancient vessel costing $15,500.00 in 1947, is valued at $30,000.00 seven years later—an increase making the total approximately 200% of the original, or more if depreciation is considered—and this in a declining market, where the vessel has lost her employment and is idled, the result is sufficiently surprising and incongruous as to indicate that error has occurred. The initial and conditioning error, of course is, as has been argued *supra*, the compulsory reference to a special commissioner where the rules accepted for himself absolutely conditioned the result. Of these rules, the basic one which led to the overall so-generous result was, as the record clearly demonstrates, the acceptance of an opinion valuation figure, without any competent foundation, made by "experts" and the commissioner's refusal to consider the competent facts established upon this record and accord to them the weight to which they are entitled at law.

CONCLUSION

For all of the above reasons, a writ of certiorari, as prayed for, should be granted.

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